No. 2513.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

JOHN H. MUSTARD, SAM J. TAGGART and FRED AYER,

Appellants,

vs.

E. C. ELLWOOD,

Appellee.

Petition for a Rehearing on Behalf of Appellants.

G. J. LOMEN,
O. D. COCHRAN,
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CATLIN, CATLIN & FRIEDMAN,
Of Counsel.

Filed this.....day of June, 1915.

F. D. MONCKTON, Clerk,

By....., Deputy Clerk.

THE JAMES H. BARRY CO.

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PETITION FOR A REHEARING ON BEHALF OF APPELLANTS.

To the Honorable William B. Gilbert, Presiding Judge, and the Associate Judges of the United States Circuit Court of Appeals, for the Ninth Circuit:

Appellants respectfully petition that the decision of this Court herein be set aside and that a rehearing of the cause be granted.

In the opinion of counsel for the appellants no more important question touching on Alaskan matters has been brought into the Courts of the United States in a decade or more. Viewed from the narrow point of

liquor selling the case would be of no great public interest, but from the actual viewpoint, the mere question of a privilege to dispense liquor fades into insignificance. We hope to convince the Court that an institution, the influence of which upon life, culture and civilization in a far off territory is about to fall by reason of a prohibitory tax, and that upon its ruins another institution, not to be encouraged, will grow and gain strength.

In the consideration of this petition we earnestly impress upon the Honorable Court the ofttimes demonstrated truth that pioneer peoples cannot be justly governed by the laws made for established communities.

The construction of a statute providing for the sale of alcoholic liquors in Alaska is the only legal question involved in this case. A full consideration of the opinion of the Court, as well as of the dissenting opinion of Judge Ross, leads us to the conclusion that if we are again allowed to present our arguments, we can convince the Court that upon considerations of public policy alone the harshness of the rule as declared, in so far as it applies to clubs organized for social and literary purposes in Alaska, should be softened.

The District of Columbia is a small territory, very densely populated. It contains within its borders a great modern city, the capitol of the nation, schools, universities, and all that go to make up the culture and refinement of a highly civilized and resourceful peo-

ple. In its wisdom, Congress has legislated for its needs with full knowledge and understanding of its requirements, and the Courts have construed and interpreted its laws, seeking in so doing to search out and declare the true intent of Congress.

In 1893, a law regulating the sale of intoxicating liquors was enacted (27 Stats., 563) and was later construed and interpreted by the Court of Appeals of the District of Columbia, and, according to its plain and unequivocal provisions, incorporated clubs are held to be required to secure license as a place where liquors are sold at retail. *Army & Navy Club* v. *Dist. of Columbia,* 8 App. D. C., 544.

We cannot find any ground upon which to disagree with that construction of the law, as it seems to us apparent that Congress undoubtedly intended by the language of that part of Section 6 of the Act quoted in the majority opinion of the Court in this case, to tax clubs in the territory affected by that statute, which reads as follows:

> *"And provided, further, the said Excise Board may, in its discretion, issue a license to any duly incorporated club on petition of the officers of the club,* and that the said Excise Board may, in its discretion, grant a permit to such Board to sell intoxicating liquors to members and guests between such hours as the Board aforesaid may designate in said permit."

The portion of the Act quoted above in italics (which are our own), is an express definition of a

kind of person which is compelled to secure a license. The second portion simply gives the Excise Board power to allow such persons special privileges.

Alaska is immense in the extent of its territory, while in the numbers of its population, it is almost inconsiderable. Probably there is no territory under the sun where there are so few civilized inhabitants compared with the immensity of the area inhabited. The actual figures are amazing, about 64,000 people, half of whom are whites, occupy a territorial area of 586,400 square miles. For every white inhabitant, there is approximately 20 square miles. To every five white men, there is one white woman. In the schools established by the Government, there are altogether about 700 children. We have no figures concerning the public schools of the District of Columbia, but we assume that as its population is not a great deal less than that of the City of San Francisco, the figures can be but little different. The records of the school department of San Francisco disclose two schools of over 1100 pupils, five of over 1000, and more than a score of over 700, and a total attendance of over 60,000—a little less than the whole population of Alaska.

In the District of Columbia, there are thousands of inhabitants to every square mile of its territory. Home life there is the common thing; while in Alaska, where the comparative number of women and children are so strikingly few, it is the rare thing. In the District of Columbia, one may in a moment step from

the home or the club to the lecture room of a university, or to one of the greatest libraries in the world, or to the theatre, the opera, the lecture platform, or to any of the numberless things that go to the making of the social life of a modern American population center.

In Alaska, where there are but seven cities of over one thousand, social conditions are, and of need must be, so different from those existing in the District of Columbia that a comparison of them would be ridiculous, and we would not indulge in it were it not that from this wide difference we expect to be able to convince this Court that Congress by its enactment of the liquor license law for Alaska did not intend to destroy one of the few institutions that do in truth go to aiding in the real progressive development and preservation of culture and right living.

Alaska is icebound and in darkness over its greatest part for much more than half of the year. Travel, as that term is generally understood, is quite impossible, and the men who are accomplishing the pioneering in this great territory are for many months confined to the small population centers.

They may, during this period of enforced idleness, enjoy the comforts of their home, if they happen to belong to the few who are so fortunate as to have a home. If they have not, they may stay in such a house as they have been able to raise over their heads, or

they may go to a club, or they may go to the true bar-room.

The above description is not far-fetched, but is literal truth.

Congress when it legislated for the District of Columbia knew of the social conditions there existing. In that portion of Section 6, italicized by us quoted above, it required clubs to take a license as a retailer, after which in the portion following the italics, it gives the Board of Excise power to grant special privileges to clubs.

In legislating for Alaska, Congress is presumed to have been familiar with such conditions, and being so, intentionally omitted from the Act all mention or notice of clubs and left in it all other things enumerated. *By this omission, with full knowledge of the conditions in Alaska, and the actual hardship upon loyal and faithful citizens the heavy taxing of clubs would entail, Congress published its intention to exempt them.*

The statute is a revenue law and as such is capable of being subjected to the rules of liberal construction. But it is also penal, which would, if it were not also a revenue law, put it into the class that will only bear the strictest of construction. There is some doubt raised by the authorities as to whether revenue laws which contain penal provisions are not open to liberal construction. The weight seems to favor liberal construction, and it seems clear that in a case like the one under consideration, where there is no attempt to en-

force the penal provisions, the rule of liberal construction may be followed. But even if this is so, it is not a question in the case, for we believe that the most liberal construction would not permit of the reading into the Alaska Act, the language or spirit of the law passed for the District of Columbia, when Congress expressly discarded all mention of clubs with full knowledge of conditions in both places.

If there was any purpose in extracting the mention of clubs from the Alaska law other than to exempt them from the tax, would not Congress have inserted mention of them in the later portion so that it would read "every hotel, tavern, bar-room, *club,* or other places, etc."? The principle that the expression of one thing excludes all others would seem to have added force where lawgivers intentionally omit to express themselves as to a thing by actually striking from the law all mention of it when they were well aware of the irreconcilable decisions of the State Courts upon the subject, which they could have settled by inserting one word in the law. We respectfully urge that if Congress decided to leave from the law the one word that would have made it certain, this Court is in error to read it in.

Under the construction of this Act by the Court, a grave injustice will be done to a loyal people and an evil condition thrust upon them, that would result in the further depopulation of a territory already sadly

in need of population. Such could not have been the intention of Congress. The spirit of this law must be like the spirit of all laws,—benevolent. No law is intended to bring about evil.

Moreover, the saloon, bar-room, cafe or whatever name may be given to the place where liquor is distributed broadcast to the people, it is admittedly the most evil of all known methods of distribution. The *bona fide* club is the least evil. In the one there is nothing for the guest to do but consume liquor. In the other there is library, choice of companionship, temperance and something of the home. It seems inconceivable that Congress intended, by a prohibitory tax, to destroy the lesser evil to the benefit of the greater.

Deeply impressed by the reasoning in the minority opinion of Judge Ross, in closing our petition for a rehearing, we respectfully submit that its reasoning should be again carefully considered by the Court.

The figures given in the first part hereof concerning the relative population of Alaska and the District of Columbia, we take from New International Encyclopedia (1915), subjects Alaska and District of Columbia, and use "round" numbers. The San Francisco school data comes from a late report to March, 1915, not yet circulated or published, which is in the office of the Superintendent of Public Schools, the last published figures being somewhat smaller. (Di-

rectory of The San Francisco Public Schools, 1912-1913.)

Dated, San Francisco, June 22nd, 1915.

Respectfully submitted.

G. J. LOMEN,
O. D. COCHRAN,
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THOS. R. WHITE,
Attorneys for Appellants.

CATLIN, CATLIN & FRIEDMAN,
Of Counsel.

CERTIFICATE OF COUNSEL.

I hereby certify that I am of counsel for appellants and petitioners in the above-entitled cause, and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact, and that said petition is not interposed for delay.

THOS. R. WHITE,
Of Counsel for Appellants.